IN THE

Supreme Court of the United States

October Term, 1923

No. 324

THE IDAHO IRRIGATION COMPANY, LIMITED, *et al.*,

Appellants,

against

FRED W. GOODING, *et al.*,

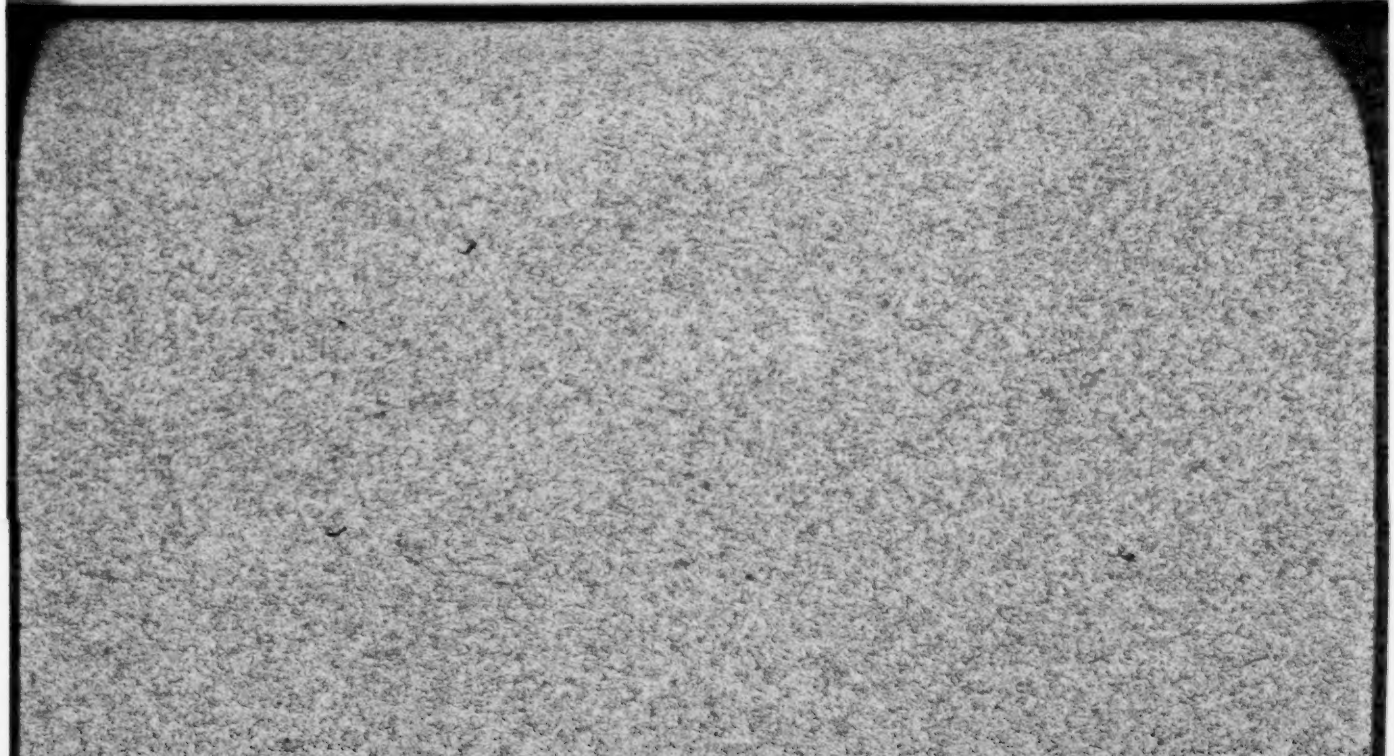
Appellees.

REPLY BRIEF OF APPELLANT, IDAHO IRRIGATION COMPANY, LIMITED

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

GORDON M. BUCK,
RAYMOND J. SCULLY,
Counsel for Appellant, Idaho Irrigation Company, Limited.

INGLE, INC., 165 William Street, New York City



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Statement of Facts.

In the brief of the appellees on the main appeal, they assert that we have "inadvertently gotten confused in the statement of facts contained in" our brief. They then purport to set forth "the full text of" Defendants' Exhibit 11 (see pp. 1 and 2). In their brief as cross appellants (p. 25) they set forth this same data and describe it as "the pertinent part of" Exhibit 11. That the appellees have omitted an essential part of this exhibit is shown by the statement in the Circuit Court of Appeals' opinion that "it appears from Exhibit No. 11 in this case that these other lands" (*i. e.*, non-Carey Act Lands) "with prior rights aggregate 19,728.57 acres" (R., 675). It is evident that the appellees are confused. An exact copy of the exhibit (of which the original has been sent to the Clerk of this Court by the Clerk of the Circuit Court of Appeals, as a part of the Record) is as follows:

Defendants' Exhibit 11.

FROM RECORDS OF BIG WOOD RESERVOIR AND CANAL COMPANY, LTD., AND IDAHO IRRIGATION COMPANY, COMPUTED FEBRUARY 21, 1920.

1.	Shares of Stock of the Big Wood River Reservoir & Canal Company issued on Carey Act Lands.....		69,107.20 (1)
2.	Shares of stock of the Big Wood River Reservoir & Canal Company issued on other than Carey Act Lands		19,728.51 (2)
	This 19,728.51 shares were issued appurtenant to the following classes of lands:		
	School Lands	2,673.70	
	Desert, Homestead, etc.....	5,009.01	
	Traded for Decreed Water..	12,045.80	
		19,728.51	
	Total shares outstanding		88,835.71
3.	Shares appurtenant to lands owned by the Idaho Irrigation Company and its Trustees as of December 9, 1917..		8,467.07 (3)
	Shares appurtenant to lands acquired by the Idaho Irrigation Company and its Trustees subsequent to December 9, 1917		4,255.57 (4)
			12,722.64
	Shares sold and resold subsequent to Dec. 9, 1917		3,143.61
	Shares appurtenant to Company owned lands on February 21, 1920...		9,579.03

It will be noted that in subdivision 2 of the Exhibit, 12,045.80 water rights are stated to have been "traded for decreed water." This decreed water, as stated in the appellees' brief on the main appeal (p. 4), "refers to those decreed rights which are of prior right to the water right of the construction company and its purchasers."

Argument.

(1) Fundamental difference in the parties' conception of the Company's contractual obligations.

The appellees' claims are based upon a conception of the rights and obligations of the parties that is fundamentally different from ours. Whatever right of participation in the water supply the appellees possess arises out of their contracts with the Company. The appellees claim that these contracts obligate the Company to deliver to them a specific amount of water in excess of the amount they would be entitled to receive if the water supply is apportioned *pro rata* over the area the Secretary of the Interior has held it ample to reclaim; in other words, they claim that the Company can obligate itself to apply the entire water supply to the portion of the patented area owned by them, although the Secretary of the Interior has held it ample to reclaim a much larger area. The purpose of the Secretary in patenting the desert lands is to bring about their reclamation. The Secretary has determined that there is an ample supply of water for the lands in question. The Company could not validly contract to the contrary. It could not obligate itself to apply the entire water supply to a part of the patented area, thus leaving the remainder without water, and therefore desert land. Nor has the Company attempted to do so. All the contracts are necessarily subject to the terms of the Carey Act and its amendments. These statutes make it the duty of the Secretary of the Interior to determine the acreage that shall be reclaimed from a given water supply. The contracts should be construed so as to accord with those statutes. The settlers by their contracts with the Company specifically agreed that their rights and the Company's obligations were defined by and subject to the terms of the contracts between the Company and the State (R., 90, 96); and the latter

contracts provide with respect to the water supply, that the settlers shall be entitled—

> "to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system" (R., 51).

We shall, therefore, not further discuss the appellees' allegations as to the obligations and liabilities of the Company to the settler.

It is quite true that the rotation system "has to do merely with the method of applying the water to the land" and does not necessarily reduce the amount of water each settler receives; but the contract provision for this system conclusively proves that the Company is not obligated to give a continuous flow; and shows, therefore, that the Circuit Court of Appeals was in error in stating that the settlers were by contract entitled "to receive one-eightieth (1/80) of one cubic foot of water per second of time per acre," which for the irrigation season is equivalent to "approximately five and one-half (5½) acre-feet" (R., 674).

(2) The patent proceedings.

While, as stated by the appellees, the Carey Act does not specifically require the Secretary to publish and post a notice calling for protests and contests prior to issuing patent, still the publishing and posting of such notice is required by the regulations of the Federal land office. These regulations have the effect of law and the Court will take judicial notice of them. There is no dispute but that, in the case at bar, notices calling for protests and contests were duly published and posted as required by those regulations (R., 444, 445). It is beside the mark to say that at the time of the patent proceedings only 23,068

acres were under cultivation. The entire area that was subsequently patented had then been segregated on the application of the State, and the proceedings involved the issue of patent not only for the acreage then under cultivation but also for the entire area that was subsequently patented. Moreover, the State, the grantor of the other appellees, participated in the patent proceedings and affirmatively represented that there was an ample supply of water for the entire patented area. The question involved was not whether the water supply was ample to reclaim the lands then under cultivation, but whether or not the water supply was ample to reclaim the entire area involved in the proceedings.

(3) This suit constitutes in effect an attack on the patent.

The appellees assert that they are not seeking to undo the patent proceedings or to molest the title to the lands. They are, however, seeking to render a large part of those lands worthless, because they are seeking to compel the application of the entire water supply to a portion of the lands, although the Secretary has, acting pursuant to the terms of the Carey Act as amended, determined that the water supply was ample to reclaim them all. The case of *Ide* v. *United States* (Adv. Ops., Oct. Term, 1923; 68 Law Ed., 201), cited by the appellees, has no bearing, nor is it a fair statement to say that the statute there under consideration (R. S. Wyoming, 1889, Secs. 917, *et seq.)*, is similar to patent proceedings under the Carey Act. The permits there authorized were made by the State Engineer and their character is sufficiently shown by the quotation from the Court's opinion appearing in the appellees' brief (p. 10). In issuing these permits the State Engineer decided nothing. They were based on *ex parte* applications and were mere licenses to appropriate water "if the water was available."

The appellees repeat that they are not attacking the patent, but that "independent of the patent proceedings" the Company has assumed contractual obligations requiring it to apply the entire water supply to the land owned by the individual appellees. The contracts between the Company and the State, however, were not, and could not have been, independent of the patent proceedings. They were all governed by the Carey Act and its amendments.

The appellees state that, in the case at bar, patent was issued long before the project had been completed Patent was issued in the year 1915 (R., 443); and the irrigation system must then have been substantially completed, for the record shows that the Company began delivering water to the farmers as early as 1911 (R., 369, 674-5).

(4) Misleading inference arising from the appellees' citation of authorities.

From the appellees' brief (p. 11) this Court would naturally infer that the two cases there cited decided that the finding of the Secretary of the Interior in the patent proceeding, as to the adequacy of the water supply, was merely a preliminary estimate. Both of these cases, namely, *Twin Falls, etc., Co.* v. *Caldwell*, 242 Fed., 177, 192, and *State* v. *Twin Falls, etc., Co.*, 166 Pac., 220, 228, were dealing with the preliminary estimate of the land office made when it segregated the lands and had no connection with the patent proceedings. The latter case is discussed in a footnote to page 16 of our main brief.

It is not necessary further to add to the discussion of the conflicting decisions upon this subject that is contained in our main brief. The appellees "admit that a complete and entirely satisfactory explanation can not be made of these various decisions" (p. 15).

(5) No uncertainty in Secretary's decision.

There is nothing uncertain, as is suggested by the appellees, as to what the Secretary of the Interior determined. The sole question for his determination was whether or not an ample supply of water had been furnished to reclaim the lands which he was asked to patent. Preliminarily, the Secretary of the Interior made a finding that was in the nature of an estimate, as to the sufficiency of the proposed plan of irrigation and also as to the sufficiency of the source of the water supply. At the time he issued patent, however, he made a definite finding of fact that an ample supply of water had been furnished to reclaim the patented lands. It has been repeatedly held that the sole consideration for the issue of patent to the State was the furnishing by the State of an ample supply of water to reclaim the lands for which patent was sought. Before issuing a patent, it was the Secretary's duty to determine whether or not this consideration had been received. The presumption is that he performed his duty.

The appellees urge that the Secretary's decision cannot be considered conclusive, because the Company has sold water rights for use on lands other than the patented area. The Company has exchanged some 12,000 water rights for "decreed" or prior rights. This did not decrease the amount of water that the Company retained for the patented acreage, because it was merely a refunding operation. The Company has also sold some 7,000 water rights for other than the patented lands. The terms of the various contracts were prescribed either by the State or the Federal land office. The Secretary of the Interior was, doubtless, familiar with their terms. His decision as to the adequacy of the water supply, no doubt, took into consideration the patented acreage and the other adjacent land that is sus-

ceptible of irrigation from the project. This acreage is limited in amount, because water will not run uphill and because it cannot be carried far beyond the canal ends. *But if, as the appellees claim, the Secretary was not conversant with the terms of the various contracts and did not consider them, still he has necessarily determined that the water supply was ample for the patented area.* This consisted of 117,000 acres. Even if we include the water rights that were traded for prior rights, the District Court's decree fixes the size of the project at 76,000 acres, and the Circuit Court of Appeals at 81,000 acres. The decision of the Secretary of the Interior, therefore, shows that the Company has not sold water rights in excess of its water supply.

If the Company's contract with the State is invalid to the extent that it requires the former to sell water rights for adjacent non-Carey Act lands that are susceptible of irrigation from the project, and if the Company must confine the sale of its water rights only to settlers on the patented acreage, then the validity of water rights sold to other parties may be tested in a suit in which the question is raised by the pleadings; but it certainly does not justify an injunction in the present suit restraining the Company from issuing additional shares; for the number of shares heretofore issued is far less than the number of patented acres.

(6) The State has consented to determination by Secretary of Interior of adequacy of water supply.

Conceding for the purpose of argument that, in Idaho, water which has become appurtenant to specific land may be sold and conveyed separate from the land, just as a building or any other appurtenance to real property may be, still this did not authorize the lower courts

to require, in the case at bar, that all of the Company's water supply be applied to a part of the patented area, when the Secretary of the Interior has determined that it is ample to reclaim the whole. The State has, by statute, specifically accepted the terms of the Carey Act. It has thus consented that the adequacy of the water supply shall be determined by the Secretary of the Interior. No State statute, much less any contract of the Company, can override the Secretary's decision. Moreover, the sale of a water right by a settler does not destroy it, nor does it reduce the acreage that is irrigated. The decrees of the lower courts, however, in effect destroy the unissued water rights, and reduce the area of the desert land that can be reclaimed.

(7) By the decree appealed from vested rights are destroyed.

The appellees state again that the purpose of the present action is not to cut off vested rights, but to prevent further rights accruing (p. 28). Under contract with the State, the Company has constructed the irrigation system, and is entitled to reimburse itself for its expenditures by the sale of water rights. The Company's water rights are represented by shares of stock in the Big Wood River Reservoir and Canal Company, the owner of the irrigation system. Enjoining the sale of these shares renders them worthless to the Company. The Company has, therefore, a vested right which the decrees of the lower courts have cut off. Whether or not the Company has a lien on the patented acreage, it certainly has a vested right to reimburse itself for its expenditures by the sale of these water rights or shares.

(8) The appellees make allegations not supported by the record.

There is nothing in the record that shows that any of the settlers on this project were formerly residents of the East, or "thoroughly unfamiliar with the conditions on Western irrigated sections," or that they bought in reliance upon the representations of the Company (appellees' brief, 30, 36). Wherever the settlers came from, their contracts with the Company were such as to put them on notice that the Company owned a specified water supply and that the apportionment of it had been determined by the Secretary of the Interior.

(9) State statutes.

The appellees take issue with our statement that there was no law in existence at the time the lands were patented, authorizing the State officers to reduce the area for which water rights might be sold. As we have seen, no State statute could have any validity, which attempted to authorize a reapportionment of the water supply in conflict with the Secretary's decision. They cite Idaho C. S., Section 3065 and Section 5636 as conferring this power.

The former section requires the Company to furnish water on demand to the owners of land subject to irrigation from its system; with the proviso that it shall not contract to deliver more water than it has title to, by reason of having complied with State laws. Under the State laws, the Company had title to an appropriation of 6,000 cubic feet per second (R., 70). Assuming a duty of water of so excessive an amount as 5½ feet, and this appropriation would still have been adequate for several times the patented acreage. Moreover, in

the patent proceedings the State Engineer had sworn that the Company's water supply was ample to reclaim the lands in question (R., 445, 452), and the Governor had certified that all the laws of the State relating to the project had been complied with (R., 451).

Section 3065 we need not consider, since it has no application. Section 3067, which forms a part of the same chapter as Section 3065, provides as follows:

> "Parties constructing irrigation works primarily for the purpose of irrigating lands segregated from the public domain under the act of congress commonly known as the Carey act, * * * are hereby exempted from the provisions of this chapter."

We therefore reiterate that there was no State statute that purported to authorize the State officials to reapportion the water supply; and if any such statute had been enacted it would have been unconstitutional, because in conflict with the Carey Act and its amendments. The Federal statutes authorize the Secretary of the Interior to determine the acreage that the water supply is ample to reclaim. The State has by statute accepted the terms of the Carey Act and has applied for patent thereunder. No State statute could be valid if it purported to authorize the application of all of the water supply to a part of the patented acreage, when the Secretary has found it was sufficient for the whole and has patented the acreage to the State on the State's representation that it would be so applied. It is idle to say that the plaintiffs here are not attacking land titles but only water supply; because the land without water has no value.

(10) The appellees are not in a position to ask the aid of a court of equity.

It may be, as stated by the appellees, that the Attorney-General of Idaho has taken only a half-hearted interest in the litigation, but that does not remove the uncleanliness from the State's hands. Such half-hearted action does not constitute an offer on the part of the State to do equity; nor is it surprising that the State officials should be adverse to attempting to sustain the State's position in this litigation. The rights of the appellees, other than the State, are based on its action, and if its hands are unclean, the hands of its grantees are equally unclean.

The appellees assert that while they have purchased their lands from the State, they purchased their water rights from the Company. If they hold lands, however, that have been acquired by their grantor by means of representations which they now seek to attack as false, the fact that they purchased their water rights directly from the Company does not cleanse their hands. Moreover, the rights of the parties with respect to these water rights were defined by and were subject to the terms of a contract which was based upon the State's approval of the adequacy of the water supply and which authorized the sale of 150,000 water rights. The State has received and holds the patented acreage on its representation that the water supply was ample to reclaim it. The State by its Engineer and by its Board of Land Commissioners approved the proposed plan of reclamation and the source of the Company's water supply. It then entered into a contract with the Company to build the works in accordance with this plan and authorized it to sell not exceeding 150,000 water rights. The contract between the Company and the settlers expressly put the latter on notice of the Company's prior contract

with the State. The action of the State in approving the adequacy of the water supply lies at the basis of the rights of the other parties.

The settlers are entitled only to a *pro rata* portion of the water supply, when it is apportioned over the entire area in question. They have no right to demand more. Even if the amount of water that they will receive is somewhat reduced, this will constitute a small loss in comparison to the enormous loss that the Company and its bondholders must bear if it is prohibited from selling additional water rights.

(11) Knowledge of the parties at time of contracting.

Doubtless, the Company did make an investigation of the water supply and the surrounding conditions. If it did, it found the water supply ample. Both the State and the Federal officials have also so found. We confidently assert that these findings were correct.

Perhaps the settlers did not send engineers into the field to investigate the water supply. They knew, however, that the State and Federal officials had held it to be sufficient and they contracted with the State with that knowledge, and relying upon those findings.

(12) The pleadings.

The appellees allege that by its pleadings, the Company has in effect admitted the inadequacy of the water supply. The Company specifically denies

> "that said land requires the application thereto of at least * * * one-eightieth (1/80) of one cubic foot of water per second of time for each acre during the irrigation season for the successful irrigation, reclamation and cultivation thereof; * * * that one-eightieth (1/80) of one cubic foot of water per second of time per acre is

> necessary for the raising of ordinary agricultural crops thereon; * * * that with a less amount of water than one-eightieth (1/80) of one cubic foot of water per second of time per acre of land during the irrigation season, such lands are worthless * * * " (R., 115-6).

The Company alleges the sufficiency of the water supply (R., 116), and denies that it has oversold its capacity to deliver water (R., 117). It avers that if it and the trustees are permitted to sell the remaining shares of stock of the Canal Company

> "said shares will represent an ample supply of water and a sufficient carrying capacity in the irrigation works of said defendant company to properly irrigate the land to which said water is appurtenant" (R., 119).

It denies that such sale would decrease the settlers' water rights to such an extent as to render them worthless, or would so reduce their water supply as to prevent them from raising ordinary agricultural crops (R., 120).

Finally, the Company specifically sets up, as an estoppel against the appellees, the decision of the Secretary of the Interior and alleges that this decision is conclusive and binding (R., 122-4).

Notwithstanding the foregoing, the counsel for the appellees state (p. 38) that, because of the admissions in the Company's answer, the "only real issue worthy of consideration by this court" is one of fact, namely, the adequacy of the water supply. They say that they "are sincere in this statement." They thus protest too much! Then, too, are we to infer that in their other statements they are insincere?

(13) Adequacy of water supply.

On the issues of water supply, transmission losses and duty of water, the appellees, in their brief on the main appeal, have made a number of statements which are inaccurate. These issues are argued fully in our main brief and we shall confine ourselves here to pointing out such inaccuracies.

The appellees in their statement of the case imply (p. 3), without any reference to or basis in the record, that the decreed rights shown in Defendants' Exhibit 11 to have been exchanged by the Company for water stock were of an inferior class and say that these decreed rights were "often inadequate during seasons of low water." There is nothing in the record to show that the decreed rights acquired by the Company by exchange were of any such nature. On the contrary, the appellees' witness, A. V. Tallman, testified (R., 258): "The Company owns some of the oldest rights on the river, and those are filled, and then the other old rights come in." In all cases the decreed rights acquired by exchange were superior to the Company's rights. It is, however, true that the motive of the owners of the decreed rights in making the exchange was to stabilize their water supply, as suggested by the appellees.

In summarizing the evidence as to water supply (our main brief, pp. 65-7), we have simplified the issue by deducting all old rights and all losses before reaching the figures given. Those figures represent the water supply in acre feet which the Company could supply at the farmers' headgates. The flood rights have no interest in the flow of water, until the Company has exhausted its rights.

The statement that the water for all of these classes comes from the same water shed is true, but it does not

of necessity pass through the Company's reservoir, as the appellees state (p. 4). The water from Little Wood River, which is part of the Company's supply and is used to irrigate a substantial area, comes from the same water shed but does not pass through the reservoir (R., 241, 243-4).

The appellees state (p. 40) that the evidence in Plaintiff's Exhibits 1, 3 and 9 and Intervenor's Exhibit 1, on which the appellants rely for evidence as to the water supply available to the Company, was submitted "largely by the appellees." This evidence was submitted entirely by the appellees, as the designation of the exhibits shows, the intervenor being the State of Idaho. There was no conflict in the evidence as to water *available*.

The appellees state that they were unable to obtain the records of the Company until the trial was well under way and subpoenas *duces tecum* had been employed. The exhibits on which appellees rely as to water supply and on which the lower courts based their opinion were *Defendants'* Exhibits 13 and 14. They were voluntarily put in evidence by the Company to show the amount of water *delivered* and did not purport to show the amount of water *available*.

The appellees refer to Plaintiffs' Exhibit 10 (R., 370) in support of their position as to water supply. The figures in that exhibit have substantially no bearing on the amount of water available, because normally during the irrigation season water is flowing both in and out of the reservoir and the amount in the reservoir at any one time is no measure of the amount of water available for the season. The appellees recognize this when they say, speaking of old rights: "* * * their water supply was generally adequate even in low water seasons" (p. 3). Moreover, none of the water of Little Wood

River, which the Company uses for irrigation, flows through the reservoir at any time (R., 241, 243-4).

The appellees itemize eight reasons why the evidence *they* submitted at the trial as to water supply (Plaintiffs' Exhibits 1, 3 and 9 and Intervener's Exhibit 1) did not constitute "evidence sufficient for the purposes of this case," as follows:

First: They state that these exhibits include water which was not available to purchasers from the Company. Reference to our brief (pp. 65-7) shows that in every instance the figures we have used are the figures shown in Plaintiffs' Exhibits to be the amount of water available *to the Company at the farmers' headgates after all old rights and all losses have been deducted.* For example, we have stated that Plaintiffs' Exhibit 9 (R., 305) shows the water supply at the farmers' headgates to be 265,381 acre feet. The first column of that exhibit shows the total flow available to be 488,740 acre feet before deduction of old rights and the exhibit specifically says "265,381 acre feet average available at farmers' headgates for eleven years above indicated." Intervenor's Exhibit 1 shows (total of first and fourth columns) 583,800 acre feet available before deduction of old rights, but in our brief we have used the figures shown in seventh column, 401,500 acre feet, which is stated to be the "total available to Idaho Irrigation Company."

Second: The appellees state that the supply shown by their exhibits included water which ran over the spillway during seasons of high water. Much, if not all, of this water was used for irrigation or for prior decreed rights (R., 298). If any water was in fact wasted it would now be saved by the raising of the spillway on the reservoir dam. The old or prior decreed rights have no interest in reservoir water, their rights being confined

to the flow of the river, which, however, may come through the reservoir and over the spillway.

Third: The appellees state that a large amount of water escaped from the system and became waste at the Thorpe place. This evidence was discredited by showing that the water passing the Thorpe place included the flow of Little Wood River (R., 302) and the return flow from water used for irrigation. The heightened spillway would check any such waste since 1917.

It is also stated that "these exhibits included the amounts of water that went to supply the flood rights and later users." In view of the contention of the appellees that the water supply of the Company is not sufficient for their purposes, it is enlightening to know that there are flood rights and later users who receive water, although they are entitled only to the flow after the Company's rights are exhausted.

Fourth: They state that these exhibits included the water belonging to the old rights. We have shown that, while these exhibits do show the waters belonging to the old rights amounting to approximately 100,000 acre feet, such rights were deducted before reaching the figures given in our brief.

Fifth: They state that these exhibits included the canal loss of 30 per cent. This is inaccurate, as the figures in our brief in each case show the amount of water available at the farmers' headgates after the canal loss has been deducted.

This statement is also a sufficient reply to the Sixth and Seventh objections made in appellees' brief to these exhibits.

Eighth: It is true that only the flow of Little Wood River during the irrigation season can be utilized by the Company, but this is all we have taken in reaching the figures shown in our brief.

The appellees state that the other exhibits, referring to Defendants' Exhibits 13 and 14, show "the actual amount of water for use by the settlers upon the project of the Idaho Irrigation Company." These exhibits are entitled (R., 572-3) "*Delivery* at Main Canal Heads" and "*Delivery* at Farmers' Headgates." They have no reference to the actual amount of water *available* for use by the settlers.

The appellees in their brief (p. 40) have referred to Plaintiffs' Exhibit 10, which purports to show the maximum reservoir storings, and apparently suggest that it is possible to determine therefrom the amount of water available. We have pointed out that the amount of water in the reservoir at any one time is of no value in determining the water available for the season unless the flow of water into the reservoir has stopped, and moreover, that it is of no value unless the flow of Little Wood River, which is used for irrigation but does not enter the reservoir, is also considered.

The appellees, summarizing a statement of the witness Kays (p. 43), attempt to show that there was no over-abundance of water after the season of 1913 and that the practice of wasting water was then eliminated. It is true, as the appellees state, that the witness said, "that practice has not been followed," but he added "*to such an extent* excepting during the forepart of the years 1916 and 1917" (R., 560).

It is repeatedly stated that the irrigation season is from April 1st to November 1st. The evidence was clear, however, that water was not needed for that entire period and it was stated by counsel for the appellees that they considered the irrigation season for practical purposes to be 153 days (R., 234).

Their statement (p. 44) that "the reservoir has been drained five out of nine seasons" is inaccurate. Appellees appear to be referring to the seasons 1911-20, inclusive; that is, ten seasons. In 1911 the reservoir was drained for construction work on November 5th, which

was after the close of the irrigation season (R., 435). In no year has water been furnished after November 1st, and it is customary to shut off water long before that date, as there is no need for it (R., 435). The appellees cite the District Court as stating that the reservoir was dry February 23, 1920. If true, this would be immaterial on the issues, because that date was long before the opening of the 1920 irrigation season, but there is no evidence whatever in the record that the reservoir was dry at the date specified. The reservoir was drained in 1915, 1918 and 1919 before the close of the irrigation season; that is, in three out of the ten years which the appellees have referred to or in three out of twelve years, if we consider the total period covered by Plaintiff's Exhibit No. 9 and Intervenor's Exhibit No. 1. But even in those years, which were drought years in all Idaho, the settlers on the Company's project were able to raise two crops (R., 308, 333).

We stated in our main brief that the summary there given (pp. 65-7) of the appellees' evidence included all evidence the appellees offered as to water supply available and that there was no conflict in the evidence on that issue. The appellees now state (pp. 44, 46) that the witness Baer testified that "the amount of water that would reach the farmers' headgates after deducting all losses would be 123,760 acre feet," apparently suggesting that this statement raises a conflict in the evidence as to water available. To make this argument plausible, however, the appellees found it necessary to omit the first part of the sentence they quote. It reads as follows (R., 279): "Assuming that there was 195,600 acre feet in the reservoir at the time the Idaho Irrigation Company begins to draw on its storage water for the purpose of irrigating the land, and that they draw it out in sixty days, and assuming the reservoir loss to be 12,800 acre feet, the amount of water that would reach the farmers' headgates after deducting all losses, would be 123,760 acre

feet." The witness is clearly not testifying as to water available. He is assuming a certain amount of water available, to wit: 195,600 acre feet, which he states to be the capacity of the reservoir. And he goes on to say that if this were the only water at the disposal of the Company, the farmers would receive, after deduction of losses, the amount he states. The figure he takes as a premise is obviously an arbitrary one, as he makes no allowance for the inflow of water into the reservoir which occurs during the irrigation season, whether the reservoir is full or not, and he makes no allowance for the flow of Little Wood River, from which a substantial area is irrigated. As we have stated, the capacity of the reservoir is indicative of the amount of water available for irrigation only at such time as the flow of Big Wood River is cut off, and then only as to the water available from that source.

The appellees state (p. 46) that the raising of the spillway should not be taken into consideration in determining the water resources of the Company at the time of trial, because the spillway did not increase the supply in 1918 and 1919. Naturally, in drought years such an improvement would be of no benefit, unless it had been in existence during a normal or flood year, so that it could be used to increase the supply of stored water. Assuming, however, that the trial court had any right to go into the question of water supply, the issue before it was not what water the Company had furnished, but what it could furnish with the system in use at the time of trial and the added storage capacity resulting from the raising of the spillway should have been taken into consideration.

The reference of the appellees (p. 46) to that part of our brief dealing with the case of *Wyoming* v. *Colorado* is a misinterpretation of our argument, which we believe to be sufficiently clear as it stands.

We had stated in our brief that there was no conflict in the evidence as to the amount of losses in transmission, which were uniformly set by the witnesses at 30 per cent. The appellees state that one witness fixed the loss at 30 to 35 per cent. and refer to page 416 of the record. The reference to the record does not sustain their statement. They further say that the transmission loss of 30 per cent. did not allow for the river loss which, by stretching the irrigation season from April 1st to November 1st, they estimate to be a large amount. This loss, however, has been deducted in reaching the figures of available water supply summarized at pages 65-7 of our main brief, as all the figures there given are in acre feet at the farmers' headgates, all previous losses having been deducted. Moreover, the District Court in its opinion makes no reference to any river losses, but says: "The transmission loss in the main canals is thought to be in excess of 35 per cent. and is not likely to fall below that figure" (R., 150).

The appellees suggest that a comparison of Defendants' Exhibit 13 and 14 (R., 572-3) shows that there is "a tremendous system loss." This method of determining loss, which is evidently that followed by the trial court (R., 150), is erroneous, and we have discussed it at pages 74-75 of our main brief.

The appellees take the position that the appellants' answer admits a duty of 5½ acre feet. This contention hardly requires a reply. The trial court evidently was not of the opinion that such an admission had been made, as it set the duty of water at 2¾ acre feet, and the appellees evidently did not consider during the trial that such an admission had been made, as a great part of their evidence is devoted to the duty of water. No witness testified that any such amount of water was necessary. The admission quoted, of course, referred to the rate of flow of water and to the capacity of ditches. The testimony of the witness Badley referred to by the

appellees (p. 51), when carefully considered, is to the same effect and refers only to the head of water which the Company was to furnish.

The foregoing discussion of the evidence was hardly necessary, since the adequacy of the water supply is not a question for the courts to review. If such review is permitted, in every controversy between a construction company and the settlers the issue will be raised; and the administration of the desert lands will devolve upon the courts, instead of on the Federal land officials.

Respectfully submitted,

GORDON M. BUCK,
RAYMOND J. SCULLY,
Counsel for Appellant Idaho Irrigation Company, Limited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 336.

FRED W. GOODING ET AL., APPELLANTS,

against

THE IDAHO IRRIGATION COMPANY, LIMITED, AND THE EQUITABLE TRUST COMPANY OF NEW YORK AND LYMAN RHOADES, AS TRUSTEES, ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MEMORANDUM IN REJOINDER TO REPLY BRIEF OF APPELLANTS.

HARRISON TWEED,
Counsel for The Equitable Trust Company of New York and Lyman Rhoades, as Trustees, et al.

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In their main brief on the cross appeal the plaintiffs attempted to sustain their right to an injunction restraining the sale of the shares or water rights acquired pursuant to foreclosure upon the sole ground that they were acquired and held by the Irrigation Company and not by the mortgage trustees. There was no suggestion that if the shares were acquired and held by the mortgage trustees the plaintiffs were entitled to restrain their sale. In our brief, we

pointed out that the record clearly discloses that the shares acquired pursuant to foreclosure were acquired by the mortgage trustees and were held by them primarily for the benefit of the bondholders and only secondarily for the benefit of the company and its stockholders. In their reply brief, the plaintiffs make two points which were not suggested in their original brief, and while their unsoundness is readily apparent and will be pointed out upon the argument, we think that the court is entitled to a memorandum in rejoinder.

1. The plaintiffs say that the Irrigation Company "while in name a corporate entity, was in fact a mere mechanical contrivance for administering the affairs of its bondholders and mortgagee." This conclusion is based upon the premise that under the Plan and Agreement of Reorganization dated May 23, 1913, which was nearly five years after the organization of the corporation and the original issue of bonds, the stock of the Irrigation Company was deposited with a Security Holders' Protective Committee in order to protect the interest of the bondholders and avert a foreclosure of the mortgage. It is obvious that this did not affect the rights of the bondholders to the mortgaged assets of the company and that they retained all of their rights as mortgagees. It certainly did not demote the bondholders to the rank of stockholders. Therefore, the "thin veil of technical and legal ownership" which the plaintiffs suggest the court should "employ its equitable powers to penetrate" is nothing more nor less than a valid, legal mortgage, against which nothing can be said except that the bondholders permitted the company to continue its business instead of foreclosing upon its assets.

2. The plaintiffs say that when the mortgage trustees foreclosed the pledges of the shares or water rights sold to defaulting settlers and purchased them at sheriff's sale, they acquired only such right and interest in those shares as *the company* would have obtained if *it* had purchased them. The authorities to which they refer, including the much cited case of *Childs v. Neitzel*, 26 Ida., 116, establish the well known and admitted principle of law that the assignee of a mortgage takes it subject to all the defenses which the mortgagor might have set up against the mortgagee and of which the assignee had actual or constructive notice. The mortgagor in this case is the settler whose pledge is being foreclosed. Therefore, the most that this principle establishes is that when the mortgage trustees, as the assignees of the pledges of the shares, attempted to foreclose the same, the settler against whom the foreclosure was had might have set up against the mortgage trustees any defense which he might have set up against the company. That is not the situation before the Court. No one is setting up any defense to a foreclosure. The pledges have already been foreclosed, and the pledged shares have been sold at sheriff's sale.

The plaintiffs also cite from 19 Ruling Case Law, 625, as follows:

> "The title conveyed by such completed foreclosure sale is all the right, title and interest in and to the mortgaged premises which the mortgagor possessed at the time the mortgage was executed, or which was subsequently acquired by him."

This statement precisely sustains our position, which is that the mortgage trustees acquired all of the right, title and inter-

est of *the settlers*, who were the mortgagors of the shares purchased. The plaintiffs attempt to pervert the meaning of the rule quoted when they say that it establishes that the mortgage trustees acquired only the right, title, and interest which *the company* would have acquired.

To repeat what we have already said in our main brief, the situation was this: The company issued shares representing water rights which, when issued, entitled each holder to a proportionate share of the water without preference or priority. When the shares were outstanding in the hands of settlers the holders, as between themselves, were entitled to nothing more than a proportionate interest in the water, and no one of them had any right or claim against any other. Any settler might sell his shares, and the purchaser would acquire precisely the same rights and standing even though he knew that the water supply was inadequate. The right to be free from the assertion of priority by any other shareholder is an inherent and essential element of the nature of the shares. If, upon foreclosure by the mortgage trustees, some outsider had purchased the shares, there could be no question of his right to water on an equality with all the other settlers. When the mortgage trustees purchased on foreclosure, they did so as outsiders. The only ground for discriminating against them is that they represent the bondholders, who, in order that the project might be constructed, advanced their money upon the security of pledges of these shares, at a time when no one questioned the adequacy of the water supply. It seems to us that in equity, or elsewhere, that is a poor ground for discriminating against them.

If we assume the correctness of the plaintiffs' construction of the contracts, it may be true that if *the company* had

bought in the shares it could have been restrained from reissuing them. But that does not mean that the shares themselves would have been subject to any priorities. They would still represent a proportionate interest in the water, but the company might not be allowed to sell the shares, *because to do so would be to violate its assumed agreement* with the other settlers not to sell shares in excess of the water supply. The original settler held his share free of all asserted priorities for he made no such agreement. Similarly, upon foreclosure, an outsider could purchase a share and hold it free of all asserted priorities, because he has made no such agreement. Neither the mortgage trustees nor the bondholders have made any such agreement and they may buy shares upon foreclosure and acquire the same right to water free of asserted priorities that any other outsider would acquire.

It comes down to this: that the holders of water rights have agreed that they shall have no rights or priorities as between themselves; that, therefore, any holder of shares has a right to a proportionate interest in the water unless he has disqualified himself by an agreement to the contrary; and that the company is the only one which is alleged to have made any such agreement.

The plaintiffs talk of equity and substance. What is the real substance of the transaction? The bondholders loaned money to the company to enable it to construct an irrigation system which, when the settlers should have paid for their water rights, was to belong to them. The bondholders took for security the promise of the settlers to pay for their interests—a promise which was secured by a pledge of their interests. Those interests were expressly proportionate interests without priority one against the other. Now that some

of the settlers have failed to pay the money which would have gone to repay the loan by the bondholders, the other settlers attempt to deny to the bondholders the interests which they received as security. They attempt to disavow the essential term of the relationship—that all shall be on a parity. Going a little deeper, the substance is this: There were persons willing to settle upon certain desert lands, if those lands could be irrigated. Acting separately, they could not raise the money to construct the necessary irrigation system. The bondholders loaned money to them collectively, taking as security a pledge of the interests which the settlers should acquire in the completed project. The settlers agreed among themselves that their interests should be proportionate and without priority one against the other. Thereafter some of them defaulted in their payments, so that the bondholders were compelled to take over their interests to satisfy the debt. Instantly, the other settlers turn upon the bondholders, saying "there is not enough water for all of us. We will take yours, notwithstanding our agreement that the interests of all should be equal and proportionate and on a perfect parity." And they have the audacity to talk of equity!

Respectfully submitted,

HARRISON TWEED,

Counsel for The Equitable Trust Company of New York and Lyman Rhoades, as Trustees, et al.